

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

NATHANIEL WALLACE,

Petitioner,

v.

SMALL, Warden, et al.,

Respondents.

Civil No. 09cv2567-DMS (WVG)

**ORDER DENYING IN FORMA  
 PAUPERIS APPLICATION AND  
 DISMISSING CASE WITHOUT  
 PREJUDICE**

Petitioner, a state prisoner proceeding pro se has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, along with a motion to proceed in forma pauperis.

**IN FORMA PAUPERIS APPLICATION**

The request to proceed in forma pauperis reflects a \$21.18 balance in Petitioner's prison trust account. The filing fee associated with this type of action is \$5.00. See 28 U.S.C. § 1914(a). It appears Petitioner can pay the requisite filing fee. Accordingly, the Court **DENIES** the request to proceed in forma pauperis. Petitioner may submit a copy of this order along with the requisite fee no later than **January 19, 2010**, to have the case reopened.

**FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner has failed to allege that his state court conviction or sentence violates the Constitution of the United States.

1 Title 28, United States Code, § 2254(a), sets forth the following scope of review for  
2 federal habeas corpus claims:

3 The Supreme Court, a Justice thereof, a circuit judge, or a district  
4 court shall entertain an application for a writ of habeas corpus in  
5 behalf of a person in custody pursuant to the judgment of a State  
6 court only on the ground that he is in custody in violation of the  
7 Constitution or laws or treaties of the United States.

8 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.  
9 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800  
10 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim  
11 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of  
12 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the  
13 United States.” See 28 U.S.C. § 2254(a).

14 Here, Petitioner claims that he was denied his rights under California Penal Code section  
15 1381. (Pet. at 5.) In no way does Petitioner claim he is “in custody in violation of the  
16 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

17 Further, the Court notes that Petitioner may not be able to simply amend his Petition to  
18 state a federal habeas claim and then refile the amended petition in this case. He must exhaust  
19 state judicial remedies before bringing his claims via federal habeas.

### 20 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

21 Habeas petitioners who wish to challenge either their state court conviction or the length  
22 of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.  
23 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial  
24 remedies, a California state prisoner must present the California Supreme Court with a fair  
25 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28  
26 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court  
27 remedies a petitioner must allege, in state court, how one or more of his or her federal rights  
28 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:  
“If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal  
rights, they must surely be alerted to the fact that the prisoners are asserting claims under the

1 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas  
 2 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the  
 3 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only  
 4 in federal court, but in state court.” Id. at 366 (emphasis added).

5 Although Petitioner indicates that he raised a claim in the state supreme court regarding  
 6 a motion pursuant to Penal Code section 1381 (see Pet. at 4), it does not appear that Petitioner  
 7 presented the federal nature of the claim, if any, to the state’s highest court. If Petitioner has  
 8 raised the federal aspect of his claim, if any, in the California Supreme Court, he must so  
 9 specify. The burden of proving that a claim has been exhausted lies with the petitioner.  
 10 Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir.1981).

11 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death  
 12 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ  
 13 of habeas corpus by a person in custody pursuant to the judgment of a State court. The  
 14 limitation period shall run from the latest of:

15 (A) the date on which the judgment became final by the  
 16 conclusion of direct review or the expiration of the time for seeking  
 such review;

17 (B) the date on which the impediment to filing an application  
 18 created by State action in violation of the Constitution or laws of the  
 United States is removed, if the applicant was prevented from filing  
 by such State action;

19 (C) the date on which the constitutional right asserted was  
 20 initially recognized by the Supreme Court, if the right has been  
 21 newly recognized by the Supreme Court and made retroactively  
 applicable to cases on collateral review; or

22 (D) the date on which the factual predicate of the claim or  
 23 claims presented could have been discovered through the exercise  
 of due diligence.

24 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

25 The statute of limitations does not run while a properly filed state habeas corpus petition  
 26 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).  
 27 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’  
 28 when its delivery and acceptance [by the appropriate court officer for placement into the record]

are in compliance with the applicable laws and rules governing filings.”). However, absent some other basis for tolling, the statute of limitations does run while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas relief because he has not satisfied the filing fee requirement and has not stated a federal claim in the Petition.

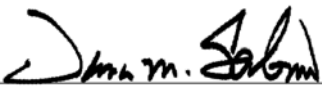
### CONCLUSION

Based on the foregoing, the Court **DISMISSES** this action without prejudice because Petitioner has failed to satisfy filing fee requirement and failed to state a cognizable federal claim. To have this case reopened, Petitioner must, no later than **January 19, 2010**, pay the \$5.00 filing fee or submit adequate proof of his inability to pay the fee, **and** file a First Amended Petition that cures the pleading deficiencies set forth above. The Clerk of Court shall send Petitioner a blank First Amended Petition form and a blank Motion to Proceed In Forma Pauperis form along with a copy of this Order.

Further, Petitioner is advised that if he has not submitted a First Amended Petition stating a cognizable federal claim and alleging exhaustion of his state court remedies with regard to that claim before January 19, 2010, he will have to start over by filing a completely new habeas petition in this Court. See In re Turner, 101 F.3d 1323 (9th Cir. 1997).

**IT IS SO ORDERED.**

DATED: November 18, 2009

  
 HON. DANA M. SABRAW  
 United States District Judge

CC: ALL PARTIES